U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 10/16/2000

IN THE MATTER OF:	*	
	*	
William H. Rasnake	*	
Claimant	*	
	*	
v.	*	
	*	
Apache Coal Company	*	Dated: _____
and	*	
Old Republic Insurance Company	*	Case No.: 1994-BLA-1320
Employer/Carrier	*	
	*	BRB No.: 97-1328 BLA
and	*	
	*	
Director, Office of Worker's Compensation Programs, United States Department of Labor	*	
Party-in-Interest	*	

DECISION AND ORDER ON REMAND -
DENYING SECOND REQUEST FOR MODIFICATION

This Court issued its Decision and Order - Denying Request for Modification (D&O 9-15-95). Claimant proceeded without the assistance of counsel and appealed to the Benefits Review Board. The Board affirmed in part and vacated in part and remanded the case to the undersigned Administrative Law Judge for further proceedings consistent with the Board's opinion. (BRB D&O 1-28-98).

The Board affirmed this Court's determination that Claimant did not establish a change in conditions as required under Section 725.310. The Board noted that this Court properly considered the newly submitted evidence in conjunction with the previously submitted evidence of record. However, the Board vacated this Court's finding that the Claimant has not established a mistake in fact and remanded the case to me for reconsideration of this issue in accordance with the ruling of the U.S. Court of Appeals for the Fourth Circuit enunciated in **Jessee v. Director, OWCP**, 5 F.3d 723, 18 BLR 2-26 (4th Cir.

1993). The Fourth Circuit ruled in **Jessee** that an Administrative Law Judge is required to determine, based upon a consideration of all of the evidence of record, whether a mistake was made in any of the previous findings of fact by the adjudicator. Such a consideration of all the evidence of record is required in a case wherein the claimant pursuant to Section 725.310 requests a modification of a decision denying benefits as was presented in the instant case by Mr. Rasnake.

Procedural Background

The present appeal concerns this Court's denial of Claimant's second request for modification pursuant to 20 C.F.R. §725.310.

Initially Claimant filed an application for benefits on January 11, 1984 which Administrative Law Judge John S. Patton denied on August 25, 1988 on the ground that Claimant failed to establish that he was totally disabled under 20 C.F.R. §718.204(c)(1)-(4). Claimant filed his first request for modification on August 3, 1989 pursuant to 20 C.F.R. §725.310 which was denied by Administrative Law Judge Clement J. Kichuk in the Decision and Order issued on July 29, 1991. Judge Kichuk determined that the newly submitted evidence did not support a finding either of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) or that Claimant was suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1)-(4). Claimant appealed the denial of benefits to the Board. In their Decision and Order issued on April 21, 1993 the Board affirmed Judge Kichuk's finding that the newly submitted evidence was insufficient to establish total disability under Section 718.204(c)(1)-(4). The Board therefore affirmed the judge's determination that claimant did not demonstrate a change in conditions pursuant to Section 725.310 and affirmed the denial of benefits. Claimant then filed a second request for modification on November 22, 1993, and also submitted additional medical evidence.

In a Decision and Order issued on September 15, 1995 Judge Kichuk weighed the newly submitted evidence and determined that it did not support a finding of a change in condition inasmuch as the evidence did not demonstrate either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or that Claimant is totally disabled pursuant to 20 C.F.R. §718.204(c)(1)-(4). Judge Kichuk also stated that Claimant did not demonstrate that the prior denial of benefits contained a mistake in determination of fact. Accordingly benefits were denied and the Claimant appealed to the Board.

Upon review of Judge Kichuk's findings under Section 725.310

and the applicable law, the Board vacated this Judge's determination that Claimant did not establish either of the prerequisites for modification pursuant to Section 725.310. In their Decision and Order 1-28-98 the Board determined that this Administrative Law Judge did not properly consider whether Claimant established the presence of a mistake in a determination of fact. The Board noted that under the precedent established by the United States Court of Appeals for the Fourth Circuit, under whose jurisdiction this case arises, this Administrative Law Judge must reconsider the issue of whether a mistake was made in determination of fact. Pursuant to **Jessee** the Board noted this Administrative Law Judge must consider and determine whether any of the previous findings of fact was in error.

The Board also fully discussed and considered this Court's determination whether the Claimant established a change in condition. The Board noted that the Administrative Law Judge properly considered the newly submitted evidence in conjunction with the previously submitted evidence of record in determining that Claimant did not establish a change in condition as is required under Section 725.310. Accordingly the Board affirmed this Administrative Law Judge's determination that Claimant failed to establish with sufficient evidence that there was a change in his condition which merited his entitlement to benefits under the Act.

ISSUE

There is only one issue which the Board remanded to this Court for further consideration.

This Court is directed to review all of the evidence of record and all the prior findings of fact in order to ascertain whether a mistake was made in determination of fact which justified amendment of the prior denial to permit entitlement to an award of benefits to Mr. Rasnake.

Applicable Law and Regulations

Claimant filed his application on January 17, 1984, which is governed by the permanent regulations appearing in Part 718 of Title 20, Code of Federal Regulations.

Claimant's Requests for Modification appear in Part 725 of Title 20 Code of Federal Regulations. The applicable section states the following, in relevant part:

> §725.310 Modification of Awards and denials
> a) Upon his or her own initiation, or upon the

> request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner [now District Director] may, . . . at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.
>
> b) . . . Additional evidence may be submitted by any party... Modification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board.

DISCUSSION

As noted above, the Benefits Review Board has ordered the Administrative Law Judge to review all of the evidence of record and all the prior findings of fact and determine whether such a review discloses that a mistake was made in determination of a fact which resulted in a mistaken denial of benefits. In the **Jessee** decision the U.S. Court of Appeals noted that claimant Jessee argued to the Court that the original Administrative Law Judge made a mistake in determination of fact as he erroneously found that there were no qualifying pulmonary function tests. In the instant case, Claimant has pointed to no mistake in determination of fact that was made by this Court or by any prior fact finder.

Nevertheless Mr. Rasnake's request for modification does not require that he identify and point to the mistake in order to require consideration by this Court of this issue. On this point the **Jessee** court declared

> "If a claimant avers generally that the ALJ improperly found the ultimate fact and thus erroneously denied the claim, the deputy commissioner (including his ALJ incarnation) has the authority, without more, to modify the denial of benefits. We suspect that such uncompelled changes of mind will happen seldom if at all but the power is undeniably there."

Thus as properly directed by the Board this Court will now consider whether any of the previous findings of fact by Judge Patton and Judge Kichuk were made in error.

Judge Patton's Denial 8-25-88 (DX 57)

Judge Patton listed and considered the x-ray evidence of films taken in January 1984 to December 1987. Upon weighing the readings he considered the qualifications of the numerous

readers and concluded the weight was in equipoise. Judge Patton gave Claimant the benefit under the "true doubt" rule and found Claimant established the existence of pneumoconiosis by x-ray evidence under §718.202(a)(1). The U.S. Supreme Court invalidated the "true doubt" rule, thereby erasing Judge Patton's finding Claimant has pneumoconiosis. **See Director, OWCP v. Greenwich Collieries**, 114 S.Ct. 2251, 18 BLR 2-A-1 (1994). Judge Patton also found total disability was not established under any method provided by Section 718.204(c)(1)-(4). Accordingly the Judge denied benefits. Claimant did not contest the denial but he submitted his first request for modification on August 3, 1989. I find Judge Patton made no mistake in his determination of the facts he found. The Judge in his decision considered all the evidence contained in the record at that time.

Denial of First Request for Modification 7-29-91

In the decision issued on July 29, 1991, this Court denied Claimant's first request for modification which he filed on August 3, 1989. This Court listed and considered all the pre-modification and post-modification evidence. **See D&O at 2-7**. All of the newly submitted chest x-ray interpretations were negative readings by a multitude of B readers and board certified radiologists. Accordingly this Court found Claimant had not established the existence of pneumoconiosis by chest x-ray evidence under Section 718.202(a)(1). Upon considering the new evidence in conjunction with the previously submitted evidence this Court found Claimant did not establish existence of pneumoconiosis under Section 718.202(a)(2)-(a)(4).

This Court similarly found Claimant did not establish he was totally disabled by a respiratory or pulmonary impairment as required under Section 718.204(c)(1)-(c)(4). The Board agreed with this Court finding under Section 718.204(c)(4) the opinions of Drs. Endres-Bercher, Tuteur and Fino, that Claimant did not suffer from any totally disabling respiratory or pulmonary impairment, were entitled to greater weight than the equivocal opinion of Dr. Cardona. The Board also noted that while this Court failed to engage in a comparative analysis under subsection 718.204(c)(4), any error in this regard is harmless inasmuch as this Court's conclusion that the weight of the evidence failed to establish the existence of a totally disabling respiratory impairment is nonetheless supported by substantial evidence.[1]

[1] The Board noted that this Court failed to consider Dr. Berry's opinion who had rendered a medical assessment relevant to subsection (c)(4). The Board also noted that the Claimant

At this time this Court notes Dr. Berry diagnosed COPD moderate to severe, bronchitis and asthma. He related the diagnoses to the Claimant's working in coal mines 13 ½ years. The doctor made no assessment of the extent of respiratory or pulmonary impairment. He fails to explain why he based causality simply upon length of coal mine employment which, standing alone does not constitute evidence to establish disabling legal pneumoconiosis. Thus I find Dr. Berry's opinion lacks credibility, is not adequately reasoned and is outweighed by substantial evidence which established that Claimant did not suffer from any disabling respiratory or pulmonary impairment as required by Section 718.204(a)(b) and (c). I find no mistake in determination of facts was made in this Court's denial of Claimant's first request for modification.

Denial of Second Request for Modification 9-15-95

In the decision issued on September 15, 1995, this Court's analysis of all the newly submitted evidence did not demonstrate a change in conditions was established under Section 725.310. The Board ruled on January 28, 1998 that this Administrative Law Judge "acted properly in weighing the newly submitted evidence in conjunction with the previously submitted evidence, to determine whether the new evidence is sufficient to establish at least one of the elements of entitlement previously adjudicated against the Claimant." Board D&O at 3. The Board affirmed this Court's finding the evidence was not sufficient to establish the existence of coal workers' pneumoconiosis under any method provided by Section 718.202(a)(1)-(a)(4). The Board also considered in detail and affirmed this Court's determination that the newly submitted evidence did not establish a change in conditions on the issue of total disability. The Board agreed with this Court that the evidence did not establish Claimant suffered from a totally disabling respiratory or pulmonary impairment under any method pursuant to Sections 718.204(c)(1)-(c)(4). However, the Board vacated this Court's finding that Claimant has not established a mistake in fact. The Board reasoned that "the Administrative Law Judge did not review all of the evidence of record and the prior findings of fact to ascertain whether a mistake was made." The Board explained further "Rather, the Administrative Law Judge stated without elaboration, that Claimant has not established a mistake in a determination of fact since the Decision and Order of the Benefits Review Board on 4-21-93, affirming the denial of modification and denial of benefits." Board's D&O at 3.

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failed to present any evidence which would indicate that this Court should have modified the previous denial based on a mistake in fact.

As I have noted above, Claimant did not and needed not to direct this Court's deliberation to a specific mistake made by a fact finder in the previous proceedings of this case. A close review of the entire record in pursuit of finding a possible mistake in determination of fact by Judge Patton in denying the claim or by this Court in denying both requests for modification, has produced no results to establish a necessity to overturn the denials as ordered by these adjudicators and as affirmed by the Board itself.

It is clearly established in the record that even if Claimant had proven with sufficient weight of the evidence that he does have coal workers' pneumoconiosis as defined in the Act and regulations, there is no evidence sufficient to establish Mr. Rasnake is totally disabled due to a respiratory or pulmonary impairment, as required by the Act. The valid pulmonary function studies, old or new, do not satisfy the disability criteria and never did. So too the blood gas tests, old and new, do not demonstrate Claimant's disability. There is no evidence of cor pulmonale with right sided congestive heart failure. Finally, in rendering a finding that the proof did not establish Rasnake's disability based on medical opinions, this Court did not make a mistake. Based upon substantial evidence, this Court found under both requests for modification Claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c). The Board agreed with this Court and affirmed such findings of no total disability. Since total respiratory disability is a requisite element of entitlement under Part 718, entitlement thereunder is precluded.

Thus, having considered each of the elements of entitlement to benefits as portrayed by Judge Patton and by this Court in their respective decisions, I find no mistake was made by this Court's decision to deny Mr. Rasnake's first and second request for modification of denying benefits to him under the Act.

DECISION AND ORDER

The second Request for Modification by Mr. William H. Rasnake, filed on November 22, 1993, is **DENIED**

_____
CLEMENT J. KICHUK
Administrative Law Judge

Boston, Massachusetts
CJK:jl

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Order may appeal it to the benefits review Board within thirty (30) days from the date of this order by filing a Notice of Appeal with the Benefits Review Board; U.S. Department of Labor; Room S-5220, FPB; 200 Constitution Avenue, N.W., Washington, DC 20210; ATTN: Clerk of the Board. A copy of this Notice of Appeal must also be served on Donald S. Shire, Esq.; Associate Solicitor for Black Lung Benefits; U.S. Department of Labor; Room N-2117, FPB; 200 Constitution Avenue, N.W.; Washington, DC 20210.